

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-351
	)	
Cox Communications, Inc.	)	NAL/Acct. No. 200932100001
Fairfax County, Virginia Cable System	)	FRN 0016034050
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER**

**Adopted: October 15, 2008**

**Released: October 15, 2008**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Notice of Apparent Liability for Forfeiture and Order* (“*NAL and Order*”), we find that Cox Communications, Inc. (“Cox”) apparently willfully violated Sections 76.1201 and 76.640(b)(1) of the Commission’s Rules (“Rules”).<sup>1</sup> Specifically, Cox apparently violated Section 76.1201 by moving certain channels to a Switched Digital Video (“SDV”) platform on October 16, 2007, in its Fairfax County, Virginia cable system, thereby preventing subscribers with CableCARD-equipped unidirectional digital cable products (“UDCPs”) from using their navigation devices to access these channels.<sup>2</sup> Further, in its deployment of SDV on October 16, 2007, Cox apparently violated Section 76.640(b)(1) by failing to provide a virtual channel table conforming to the standards required under Section 76.640(b)(1)(i) and (v). We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>3</sup> that Cox is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). We also require Cox to make appropriate refund of fees charged to customers affected by Cox’s movement of linear channels to the SDV platform on October 16, 2007.

**II. BACKGROUND**

2. Congress and the Commission have long recognized the importance of allowing consumers the freedom to purchase their own navigation devices from sources other than their cable operator, satellite provider, or other multichannel video programming distributor (“MVPD”). Thus, Congress adopted Section 629 of the Act,<sup>4</sup> which requires the Commission to ensure the commercial availability of navigation devices. By separating the security and navigation functions of equipment used to receive MVPD programming, Congress hoped to spur competition and expand consumer choice. As

<sup>1</sup> 47 C.F.R. §§ 76.1201, 76.640(b)(1).

<sup>2</sup> The term “navigation devices” refers to “converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c). The UDCPs at issue in this proceeding include certain “digital cable ready” televisions and TiVo digital video recorders.

<sup>3</sup> 47 U.S.C. § 503(b). This *NAL and Order* is issued through the coordinated effort of the Commission’s Enforcement Bureau and Media Bureau. See 47 C.F.R. §§ 0.61(f)(5), 0.111(15).

<sup>4</sup> 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

the House Report accompanying Section 629 noted, “competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services available through various distribution sources.”<sup>5</sup> At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”<sup>6</sup>

3. In its order proposing rules implementing Section 629, the Commission stated that its overarching goal was to assure competition in the availability of set-top boxes and other customer premises equipment.<sup>7</sup> The Commission explained that “[a]s navigation devices are the means to deliver analog and digital communications, competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices.”<sup>8</sup>

4. Thus, in adopting Section 76.1201 of the Commission’s Rules,<sup>9</sup> which allows subscribers to acquire, attach, and use any compatible navigation device with an MVPD’s system, as long as that equipment does not cause harmful interference or facilitate theft of service, the Commission likened its actions to its *Carterfone* decision in the telephone environment.<sup>10</sup> In *Carterfone*, the Commission allowed consumers to attach legal devices to the telephone network unless that equipment would harm the network. The Commission stated that “[a]s a result of *Carterfone* and other Commission actions, ownership of telephones moved from the network operator to the consumer. As a result, the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.”<sup>11</sup> The Commission emphasized that “[f]ollowing the *Carterfone* principle adopted in the telephone context would allow subscribers the option of owning their own navigation devices and would facilitate the commercial availability of equipment.”<sup>12</sup> The Commission stated that “[t]he steps taken in this Report and Order, if implemented promptly and in good faith, should result in an evolution of the market for navigation devices so that they become generally and competitively available.”<sup>13</sup> The Commission recognized that its work on these issues was not complete, however, and reiterated its commitment to monitoring developments regarding the compatibility of set-top boxes and digital televisions.<sup>14</sup>

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<sup>5</sup> H.R. REP. NO. 104-204, at 112 (1995).

<sup>6</sup> *Id.*

<sup>7</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5641 (1997).

<sup>8</sup> *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14776, ¶ 2 (1998) (“*Navigation Devices Order*”).

<sup>9</sup> 47 C.F.R. § 76.1201.

<sup>10</sup> *See Navigation Devices Order*, 13 FCC Rcd at 14778 (citing *Use of the Carterfone Device in Message Toll Service*, Decision, 13 FCC 2d 420, 424-25 (1968), *recon. denied*, 14 FCC 2d 571(1968)).

<sup>11</sup> *Navigation Devices Order*, 13 FCC Rcd at 14780, ¶ 11.

<sup>12</sup> *Id.* at 14786.

<sup>13</sup> *Id.* at 14780, ¶ 11. The Commission acknowledged that “the parallel to the telephone has limitations” and specifically stated that the rules it adopted in implementing Section 629 of the Act sought to accommodate the differences from the telephone model. *Id.* at 14780, ¶ 12.

<sup>14</sup> *Id.* at 14781.

5. Five years later, in the *Plug and Play Order*,<sup>15</sup> the Commission took further steps to facilitate the direct connection of digital navigation devices (including commercially available UDCPs) to MVPD systems. Specifically, the Commission considered standards agreed upon by the cable and consumer electronics (“CE”) industries<sup>16</sup> and adopted a cable compatibility standard for integrated, unidirectional digital cable television receivers, as well as other UDCPs, to ensure the compatibility and commercial availability of UDCPs with cable television systems. Generally, the *Plug and Play Order* required MVPDs to support operation of UDCPs and to ensure the utilization of such navigation devices in connection with their cable systems. In addition, the Commission required MVPDs to make available a security element separate from the basic navigation device. Under this framework, the Commission sought to enable unaffiliated manufacturers, retailers, and other vendors to commercially market UDCPs while allowing MVPDs to retain control over their system security.

6. Consumers with UDCPs access MVPD programming by using a CableCARD leased from the cable operator.<sup>17</sup> UDCPs employ a standard interface that permits them to negotiate with the CableCARD. The CableCARD descrambles the MVPD’s encoded digital signal and allows the subscriber to view the programming. Thus, commercially available UDCPs can be compatible with cable systems nationwide, while cable operators maintain their ability to secure programming content from unauthorized viewing. In theory, this arrangement allows consumers access to all of a cable operator’s linear programming<sup>18</sup> without the need of a separate set-top box leased from their cable operator, while protecting the cable operator from theft of its programming services.<sup>19</sup>

7. But recent events have demonstrated the limits of this theory. Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth, which prevents the use of that bandwidth for any other purpose. Because of ever-increasing constraints on bandwidth, many cable operators have begun to test and deploy SDV technology in their cable systems.<sup>20</sup> In

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<sup>15</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“*Plug and Play Order*”). “The term ‘plug and play’ refers to a device’s ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box.” *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025, n.9.

<sup>16</sup> *See December 2002 Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers. Plug and Play Order*, 18 FCC Rcd at 20887, n.3 (citing Letter from Carl E. Vogel, President and CEO, Charter Communications, et al., to Michael K. Powell, Chairman, FCC (Dec. 19, 2002) (“2002 MOU”)). The MOU “reflects a compromise agreement among the parties [cable and consumer electronics industries] on a specification that will permit the manufacture of unidirectional cable television receivers that include [the same] ... navigation functionality [that currently exists for set-top boxes].” *Plug and Play Order*, 18 FCC Rcd at 20890, ¶ 7.

<sup>17</sup> In most cases, the MVPDs have employed CableCARDS as their separate-security solution to enable non-integrated conditional access. *But see Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 220, 221-222 (2007). The Commission granted Cablevision a waiver of the ban on cable operator deployment of set-top boxes with integrated security to allow Cablevision to use a Smart-Card-based separate-security solution, which is CableCARD-compatible with the use of an adaptor.

<sup>18</sup> The term “linear programming” is generally understood to refer to video programming that is prescheduled by the programming provider. *Cf.* 47 U.S.C. § 522(12) (defining “interactive on-demand services” to exclude “services providing video programming prescheduled by the programming provider”).

<sup>19</sup> *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025 ¶¶ 3-4.

<sup>20</sup> *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21095, ¶ 60 (2007) (“*Viewability Order*”) (“Cable operators continue to develop ways to use their available capacity more efficiently. For example, cable operators, in order to keep pace with their competitors, are beginning to deploy ‘switched digital’-capability in their networks. In a switched digital environment, a channel is transmitted via coaxial cable to

an SDV system, a subset of programming is delivered in the traditional way to all subscribers regardless of whether they are viewing the programs. For those channels, the CableCARD-equipped UDCP works as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a “hub” (where signals are converted and placed onto the “last mile” coaxial portion of the network). These switched channels do not occupy bandwidth, and are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote control or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel.

8. A customer who uses a CableCARD-equipped UDCP to receive programming, however, must have additional equipment with the necessary upstream signaling capability to obtain the switched (*i.e.*, bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request delivery of a channel via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.<sup>21</sup>

9. As noted above, the *Plug and Play Order* not only adopted standards to allow commercially available navigation devices to work with MVPD systems, but also adopted technical rules to ensure that cable subscribers would be able to view digital cable services while still enjoying full functionality of their UDCPs.<sup>22</sup> The Commission did so pursuant to Section 624A of the Act,<sup>23</sup> which requires the agency to ensure that cable subscribers enjoy the full benefit of available cable programming as well as the features and functions of their televisions. To that end, the Commission adopted Section 76.640(b) of the Rules, which obligates cable operators to support UDCPs through compliance with certain Program System Information Protocol (“PSIP”) standards put forth by the Advanced Television Systems Committee (“ATSC”). The standards referenced in Section 76.640 were proposed as part of the *2002 MOU* reached between cable operators and consumer electronics manufacturers to ensure compatibility between consumer electronics devices and cable systems.

10. The deployment of SDV technology has implications for cable operators’ compliance with certain subparts of Section 76.640(b). First, Section 76.640(b)(1)(i) provides, in relevant part:

(b) No later than July 1, 2004 cable operators shall support unidirectional digital cable products, as defined in § 15.123 of this chapter, through the provision of Point of Deployment modules (PODs) and services, as follows:

(1) Digital cable systems with an activated channel capacity of 750 MHz or greater

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a subscriber's premises only when the subscriber tunes to that channel.”).

<sup>21</sup> In November 2007, “... CableLabs, NCTA, TiVo, Motorola, Scientific-Atlanta, Big Band Networks, and C-COR announced the availability of a technical solution for UDCPs, being adopted by TiVo, that can enable certain devices using unidirectional CableCARDS to access switched digital services previously unavailable to them.” See Letter from Gary S. Lutzker, Esq., Dow Lohnes PLLC, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 17, 2007) (“LOI Response”) at Exhibit 4, n.11 (internal citations omitted). According to the November 26, 2007 press releases provided by Cox, the external adapter was to have been available in “the second quarter of 2008.” Cox has not informed the Bureau whether the device is now available, whether the company has offered it to its customers, how the device would be priced, or how it would differ in appearance from a traditional set-top box.

<sup>22</sup> See *Plug and Play Order*, 18 FCC Rcd at 20892.

<sup>23</sup> 47 U.S.C. § 544a.

shall comply with the following technical standards and requirements:

- (i) SCTE 40 2003 (formerly DVS 313): “Digital Cable Network Interface Standard” . . . , provided however that with respect to Table B.11, the Phase Noise requirement shall be -86 dB/Hz, and also provided that the “transit delay for most distant customer” requirement in Table B.3 is not mandatory.

SCTE 40 2003, Section 5.5 states that “[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in an out-of-band Forward Data Channel, as defined in section 3.3.3 above, using the formats described in SCTE DVS/234 (rev.2).”<sup>24</sup>

11. In essence, Section 76.640(b)(1)(i) requires cable operators to send UDCPs a one-way stream of data that is separate from the video programming (the “out of band Forward Data Channel”). That data stream includes channel lineups and other programming information otherwise known as “service information tables.” This requirement applies to *all* services, both scrambled and in the clear.

12. Second, Section 76.640(b)(1)(v) further provides, in relevant part:

(v) When service information tables are transmitted out-of-band for scrambled services:

(A) The data shall, at minimum, describe services carried within the transport stream carrying the PSIP data itself;

(B) A virtual channel table shall be provided via the extended channel interface from the POD module. Tables to be included shall conform to ANSI/SCTE 65 2002 . . . “Service Information Delivered Out-of-Band for Digital Cable Television” . . . .<sup>25</sup>

13. Together, Section 76.640(b)(1)(i) and Section 76.640(b)(1)(v) require a cable operator to provide information to UDCPs allowing them to find and display a scrambled programming service on a particular channel. Section 76.640(b)(1)(i) is the basic requirement regarding service information tables, and Section 76.640(b)(1)(v) provides the more detailed specifications for how cable operators should format and transmit a particular service information table -- the “virtual channel table.” That table acts as a legend for the UDCP. When a cable operator transmits its digital cable services, those services are not necessarily transmitted on the channels listed on a subscriber’s programming guide. The virtual channel table enables a UDCP to display the programming services on the channels on which the subscriber expects to see them. As noted above, virtual channel table information is sent on a data channel separate from the video programming (“out-of-band”) via a communication path agreed upon by cable operators and CE manufacturers (the “extended channel interface”).

14. Because of the bi-directional nature of SDV technology, however, UDCPs cannot view programming provided on such a platform. If a cable operator transmits a virtual channel table that includes SDV programming to a UDCP, the UDCP will indicate that SDV programming should appear on certain channels but will be unable to display it. To avoid such a scenario, some cable operators may have unilaterally excluded SDV programming from the virtual channel tables transmitted to customers with CableCARD-equipped UDCPs.

15. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau (“Bureau”) issued a Letter of Inquiry (“LOI”)<sup>26</sup> to Cox based on complaints that the company had moved

<sup>24</sup> See SCTE 40 2003, Section 5.5, page 16.

<sup>25</sup> 47 C.F.R. § 76.640(b).

<sup>26</sup> See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal

certain cable channels that previously were accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to an SDV platform. Specifically, the Enforcement Bureau received a notice that Cox had sent to its Fairfax County, Virginia CableCARD subscribers informing them that effective October 16, 2007, Cox would implement new technology that was not compatible with one-way digital cable ready devices requiring a CableCARD.<sup>27</sup> According to the notice, customers that used CableCARD-equipped UDCPs to receive programming now would need a Cox digital set-top box to continue to receive all cable channels available to them prior to the change to the SDV platform. The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with Section 629 of the Act, Commission Rules implementing that statute,<sup>28</sup> the 2002 MOU,<sup>29</sup> and in particular, the policies and Rules established by the Commission in the *Plug and Play Order*.<sup>30</sup> The Bureau issued a Supplemental LOI to Cox on September 5, 2008<sup>31</sup> and a Second Supplemental LOI on October 3, 2008<sup>32</sup> to obtain additional information concerning the company's deployment of SDV.

16. Cox responded to the LOI on December 17, 2007,<sup>33</sup> and responded to the Supplemental LOI on September 19, 2008<sup>34</sup> and the Second Supplemental LOI on October 10, 2008.<sup>35</sup> In its LOI Response, Cox admits that its Fairfax County, Virginia cable system deployed SDV on October 16, 2007, which resulted in the movement of the Latino tier and 14 linear channels to an SDV platform.<sup>36</sup> Cox

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Communications Commission to James A. Hatcher, Esq., Senior Vice President, Legal and Regulatory Affairs, Cox Communications, Inc. (Nov. 8, 2007) ("LOI").

<sup>27</sup> *Id.* at Exhibit A. The Commission has received several complaints from Cox customers about SDV deployment in Cox's Fairfax County cable system. We have provided relevant excerpts and identifying information for those complaints in Attachment A. Because these complaints were not filed in a public Commission docket, we will treat the complainants' names as confidential for privacy reasons.

<sup>28</sup> The LOI described an investigation into possible violations of Section 629 of the Act, 47 U.S.C. § 549, and Sections 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603 of the Commission's rules, 47 C.F.R. §§ 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603.

<sup>29</sup> *See Plug and Play Order*, 18 FCC Rcd at 20885 n.3.

<sup>30</sup> *Id.* at 20885.

<sup>31</sup> *See* Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Gary S. Lutzker, Esq., Dow Lohnes PLLC, Counsel for Cox Communications, Inc., (Sept. 5, 2008) ("Supplemental LOI"). The Supplemental LOI noted that the investigation now included possible violations by Cox of Sections 76.1201 and 76.1202 of the Rules. 47 C.F.R. §§ 76.1201, 76.1202. Supplemental LOI at n. 3.

<sup>32</sup> *See* Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Gary S. Lutzker, Esq., Dow Lohnes PLLC, Counsel for Cox Communications, Inc., (Oct. 3, 2008) ("Second Supplemental LOI"). This LOI sought information relating to possible violations of Section 76.640 of the Commission's Rules.

<sup>33</sup> *See* LOI Response. The response was timely filed based on the Bureau's approval of Cox's request for an extension of time to respond.

<sup>34</sup> *See* Letter from Gary S. Lutzker, Esq., Dow Lohnes PLLC, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 19, 2008) ("Supplemental LOI Response").

<sup>35</sup> *See* Letter from J. Christopher Redding, Esq., Dow Lohnes PLLC, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (Oct. 10, 2008) ("Second Supplemental LOI Response").

<sup>36</sup> *See* LOI Response at 9, 11, and Exhibit 3. Cox states that it provided advanced notice of its switched digital implementation to its customers in the August 2007 billing inserts, which commenced on July 27, 2007 and continued through August 27, 2007, and also mailed a second notice to its CableCARD customers on September 14, 2007. In addition, Cox states that it provided advanced written notice to the Fairfax County local franchise authority ("LFA") on September 14, 2007. According to these notices, in addition to pay-per-view channels, the Paquete

states that the deployment of SDV to its Fairfax County customers affected a small number of its customers using CableCARDs in one-way devices<sup>37</sup> and that to mitigate the potential impact on these customers, Cox offered to transition them at little or no incremental cost to bi-directional equipment to ensure that they could continue accessing the switched channels, even though they had purchased a one-way CableCARD device.<sup>38</sup> Specifically, at the time of its SDV deployment, Cox offered CableCARD-equipped UDCP subscribers a standard digital receiver for the same price as a CableCARD for the first year or a free Digital Video Recorder (“DVR”) for three months.<sup>39</sup> Both those offers have since expired.

17. With respect to the technical requirements described above, Cox admits that it does not provide its subscribers using CableCARD-equipped UDCPs with a virtual channel table that includes programming on its SDV platform.<sup>40</sup> Rather, “Cox’s Fairfax, Virginia subscribers who utilize a Cox provided CableCARD with their UDCPs receive a ‘virtual channel table’ covering all of the scrambled programming services viewable on their one-way devices.”<sup>41</sup> Cox explains that it “does not populate that channel table for two-way services that are not viewable with UDCP devices.”<sup>42</sup> Cox asserts that its actions are consistent with Section 76.640 of the Commission’s Rules because -- according to Cox -- those provisions only apply to unidirectional digital cable services.<sup>43</sup> Cox further argues that populating the virtual channel table for two-way services would confuse consumers with UDCPs, as those devices are incapable of viewing two-way services.<sup>44</sup>

### III. DISCUSSION

#### A. Cox Apparently Willfully Violated Section 76.1201 By Requiring Subscribers To Obtain A Set-Top Box To View Previously Accessible Linear Programming

18. Section 76.1201 of the Rules prohibits an MVPD from “prevent[ing] the connection or use of navigation devices to or with its system” unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.<sup>45</sup> Based on the record before us, we find that Cox apparently willfully<sup>46</sup> violated Section 76.1201 by moving certain linear channels to an SDV platform in its Fairfax

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Latino Tier and 14 networks would no longer be available to Cox’s CableCARD-equipped UDCP customers without a Cox digital set-top box. Also, the notice stated that new channels added to the Cox Digital Cable and HD channel lineup will not be available to customers with CableCARD-equipped UDCPs without the use of a Cox set-top box.

<sup>37</sup> Cox reports that its Fairfax County, Virginia cable system served 241,128 subscribers as of November 9, 2007; and that it had issued 2002 CableCARDs in the Fairfax County system as of October 31, 2007. *See* Supplemental LOI Response at 2.

<sup>38</sup> LOI Response at 4.

<sup>39</sup> *Id.* at Exhibit 3.

<sup>40</sup> *Id.*

<sup>41</sup> Second Supplemental LOI Response at 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 47 C.F.R. § 76.1201.

<sup>46</sup> Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the context of Section 503(b). *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

County, Virginia cable system on October 16, 2007.<sup>47</sup> In so doing, Cox prevented subscribers with UDCPs, such as “digital cable ready” televisions and TiVo recorders, from viewing the switched linear channels that were already part of their subscription package without the use of a Cox-supplied set-top box, thus impairing the use of those UDCPs within the affected cable system. Additionally, because customers now must have a Cox-leased set-top box to view many of their channels, even on UDCP devices, Cox’s migration of channels to an SDV platform has prevented the use of some functions available on those UDCPs, such as the abilities to view picture-in-picture and to record one channel while viewing another channel.<sup>48</sup>

19. Notwithstanding its effect on CableCARD-using UDCP owners, Cox contends that its movement of existing linear channels to an SDV platform is fully consistent with the Act and the Commission’s rules and policies, including the *Plug and Play Order* and the 2002 MOU between the cable operators and the CE industry.<sup>49</sup> Cox states that in the *Plug and Play Order*, the Commission “explicitly acknowledged that the ‘MOU reflects a compromise agreement among the parties on a specification that will permit the manufacturer of unidirectional digital cable television receivers,’ and that ‘[d]ue to the unidirectional nature of this receiver specification, an external navigation device would still be needed to receive advanced features such as cable operator-enhanced electronic programming guides (“EPGs”), impulse pay per view (“IPPV”) or video on demand (“VOD”).”<sup>50</sup> According to Cox, its deployment of SDV is precisely the kind of advanced bi-directional technology that the Commission’s rules permit.<sup>51</sup> Moreover, Cox argues that the Commission has stated that Section 629 and its associated rules include no obligation for cable operators to carry any service that is used by unidirectional equipment<sup>52</sup> and that the Commission did not intend “to force cable operators to develop and deploy products and services in tandem with consumer electronics manufacturers. Cable operators are free to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services.”<sup>53</sup> As such, Cox contends that its development and deployment is consistent with the Commission’s policies and rules and with Congressional intent that in implementing Section 629, the Commission should “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”<sup>54</sup>

20. We reject Cox’s arguments as inconsistent with the language and the intent of the Commission’s rules and orders. Taken to its logical conclusion, Cox’s reasoning would permit an MVPD to move *all* of its programming to an SDV platform without regard for the impact its actions would have on customers using or wishing to use CableCARD-equipped UDCPs. Such an outcome would be fundamentally at odds with the Commission’s goal of protecting cable subscribers’ ability to view signals

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<sup>47</sup> Cox confirms that it deployed SDV technology on October 16, 2007 in its Fairfax County Virginia system. See Supplemental LOI Response at 1. Although Cox states that it has not deployed SDV technology in any of its other cable systems, it expects to deploy SDV technology in Orange County, California and Phoenix, Arizona within the coming months. *Id.* at n.1.

<sup>48</sup> Section 624A of the Act expressly mandates that the Commission “minimize interference with or nullification of the special functions of subscriber’s television receivers or video cassette recorders,” and thus ensure the full compatibility of these devices with the cable system. 47 U.S.C. § 544a(c)(1)(B).

<sup>49</sup> LOI Response at 2, 6-8.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> LOI Response at 7, quoting *Plug and Play Order*, 18 FCC Rcd at 20890.

<sup>52</sup> LOI Response at 8, citing *Gemstar International Group, Ltd.*, Memorandum Opinion and Order, 16 FCC Rcd 21531, 21542 (2001) (“*Gemstar*”).

<sup>53</sup> LOI Response at 8, citing *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd 6794, 6809 (2005) (“*2005 Deferral Order*”).

<sup>54</sup> LOI Response at 15, citing H.R. Rep. No. 104-458, at 181 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 94.

through the use of commercially available navigation devices offered in a competitive market. Cox's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a Cox-provided set-top box conflicts with the Commission's rules and policies designed to promote competition and consumer choice of navigation devices.

21. While we recognize that the *Plug and Play Order* does not prohibit cable operators from developing and deploying new technology and services, it does not permit Cox's actions here. In recognizing that cable operators are free to innovate and introduce new products and services, the Commission cautioned that such development and deployment of new products and services should not interfere with the functioning of consumer electronics equipment or the introduction of such equipment into the commercial market for navigation devices.<sup>55</sup> Indeed, the Commission has continually emphasized that its navigation device rules are an important tool for promoting competition and bringing more choices to consumers.<sup>56</sup> Yet the manner in which Cox has opted to administer its SDV programming effectively negates the concerted efforts and advances made thus far to achieve a competitive pro-consumer environment for such equipment.

22. Specifically, by moving linear programming to an SDV platform, Cox has prevented CableCARD-equipped UDCPs from receiving previously available channels and impaired the usefulness of competitive commercially available navigation devices, in violation of the Commission's Rules and the intent of Section 629. The Commission recognized that devices made pursuant to the standard adopted in the *Plug and Play Order* lacked upstream or bi-directional capabilities and therefore could not receive certain programming or services, but that recognition did not extend to services that consumers traditionally experienced as one-way services or programming that was part of the package for which they were already paying.<sup>57</sup> At no point did the Commission authorize MVPDs to modify their transmission of linear programming such that UDCP devices could no longer receive such programming without a set-top box. Cox states that "to the extent any Cox customer is unable to view any programming carried on the SDV platform, it only will be by the customer's choice."<sup>58</sup> But it is Cox that has chosen to place its customers in a dilemma -- either continue to receive the now-SDV programming by leasing a set-top box at additional cost and the expense of many of their UDCP's features, or keep using the CableCARD but lose the ability to view certain programming for which Cox continues to bill them. Such an outcome is fundamentally at odds with the policy and regulatory objectives of the *Plug and Play Order*.

23. Section 76.1201 was adopted to achieve the statutory requirement of alternative sources of navigation devices and to ensure the commercial availability of navigation devices.<sup>59</sup> The *Plug and Play Order* sought to provide further assurance of the commercial availability of navigation devices by requiring that cable operators support the operation of UDCPs in connection with their cable systems. Cox's movement of linear programming to an SDV platform clearly impairs the use of CableCARD-equipped UDCPs and fundamentally limits the commercial and competitive viability of those devices. After Cox's movement of linear programming to an SDV platform, customers who use CableCARD-equipped UDCPs can no longer receive that programming without leasing a set-top box from the

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<sup>55</sup> *2005 Deferral Order*, 20 FCC Rcd at 6809-10.

<sup>56</sup> *Id.*

<sup>57</sup> "Due to the unidirectional nature of this receiver specification, an external navigation device would still be needed to receive advanced features such as cable operator-enhanced electronic programming guides ('EPGs'), impulse pay per view ('IPPV') or video on demand ('VOD')." *Plug and Play Order*, 18 FCC Rcd at 20890, ¶7. See also *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025-26, ¶4 ("Devices made pursuant to this standard have the ability to receive encrypted digital cable programming, but do not have any upstream, or bi-directional, capabilities (*i.e.*, consumer electronics manufacturers can only make unidirectional devices under the technical standard adopted in the *Plug and Play Order*). For example, such devices cannot support two-way services such as EPGs, VOD, PPV, and other ITV [Interactive Television] capabilities.").

<sup>58</sup> LOI Response at 4 n.11.

<sup>59</sup> See *Navigation Devices Order*, 13 FCC Rcd at 14786.

company.<sup>60</sup> Those customers who choose to lease a set-top box not only must bear the additional cost, but also lose many features of their UDCPs, such as picture-in-picture viewing and the ability to record one channel while watching another. Accordingly, Cox is preventing its customers from using their UDCPs and undermining the policy goal of Congress and the Commission to ensure the commercial availability and use of navigation devices. Thus, we find Cox's October 16, 2007 migration of linear channels to an SDV platform in its Fairfax County, Virginia cable system apparently constitutes a willful violation of Section 76.1201 of the Rules.<sup>61</sup>

24. Cox also stresses the importance of the development and deployment of SDV. Cox claims it is pro-competitive, pro-consumer, vital to the digital television transition (especially for carriage of broadcast signals in both analog and digital format as required by the Commission), and critical for expanding the number of HD programming and increasing broadband transmission speeds.<sup>62</sup> Finally, Cox claims that only a *de minimus* number of its customers were potentially affected by the implementation of SDV and that the company took steps to minimize any potential inconvenience for these few customers in its promotional offer to provide bi-directional receivers at little or no cost.<sup>63</sup>

25. The deployment of SDV technology may provide public benefits. It is not Cox's deployment of SDV technology that violates Section 76.1201, but Cox's migration of existing linear programming to an SDV tier that we find inconsistent with the Commission's Rules. For example, charging for channels not presently accessible to subscribers with CableCARD-equipped UDCPs undermines the policy and regulatory objectives of the *Plug and Play Order*. Cox's movement of linear programming to an SDV platform is particularly troubling because no bi-directional navigation devices are commercially available at this time. We understand that a major impediment to the availability of such devices is the cable industry's insistence on licensing conditions that go beyond the protection of the network from physical or electronic harm or theft of service. For example, limitations on the ability to integrate broadband capability into competitive navigation devices and the ability to integrate web-based or IP content with cable-provided programming are not related to Congress' recognition that MVPDs have "a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service."<sup>64</sup> We consider such restrictions to be contrary to Congress and the

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<sup>60</sup> According to the Cox notice announcing the deployment of SDV that took place on October 16, 2007, pay-per view channels, the Paquete Latino Tier and the following channels would be moved to the SDV platform and no longer available without the use of a Cox-supplied set-top box: CMT Pure Country, NASA, Jewelry TV, Cable Market Place II, American Life TV, Ovation, CSPAN 3, BET Jazz, SBTN, Bridges TV, ART, Zee TV, TV Asia and The Filipino Channel. In addition, new channels added to the Cox Digital Cable and HD channel lineup would no longer be available after October 16, 2007 to customers with CableCARD-equipped UDCP devices. LOI Response, Exhibit 3. *See also* Attachment A (quoting complaints received after Cox's SDV deployment that cite the addition of HD channels exclusively to the SDV platform).

<sup>61</sup> Our conclusion is consistent with the Commission's decision in *Gemstar* (*see supra* note 52), which involved Time Warner Cable's removal of Gemstar's Electronic Programming Guide from the vertical blanking interval of local broadcast television stations carried on Time Warner's cable systems. Among other arguments, Gemstar claimed that Time Warner had violated Section 629 of the Act and Section 76.1202 of the Rules, 47 C.F.R. § 76.1202, which prohibits MVPDs from taking actions that prevent navigation devices that do not perform security functions from being made available to subscribers from sources unaffiliated with the MVPD. 16 FCC Rcd at 21541. The Commission rejected Gemstar's allegation, holding that Section 629 and Section 76.1202 applied to equipment, rather than third-party services. *Id.* at 21542. As an initial matter, this case involves Cox's apparent violation of Section 76.1201, not 76.1202. This *NAL and Order* does not address whether Cox's actions may have violated the latter rule. Moreover, in this case, we do not find that the Act or Commission Rules require Cox to carry a third-party service that can be used by CableCARD-equipped UDCPs. Rather, we find that Cox apparently violated Section 76.1201 by altering its mode of transmission of its existing linear programming in a manner that reduced the value and utility of such devices.

<sup>62</sup> LOI Response at 2-3, 5, 8, 14-15.

<sup>63</sup> *Id.* at 4, 15

<sup>64</sup> *See supra* note 6.

Commission's shared policy goal of expeditious commercial availability of bi-directional navigation devices.

**B. Cox Apparently Willfully Violated Section 76.640(b) by Failing to Comply with the Commission's Technical Rules Regarding the Provision of a Virtual Channel Table for SDV Programming**

26. Cox readily admits that it does not populate the virtual channel table with its two-way services.<sup>65</sup> In its defense, Cox claims that Section 76.640 only applies to unidirectional digital cable services; on its face, however, Section 76.640 applies only to unidirectional *products*.<sup>66</sup> Section 76.640(b)(1) makes no distinction between unidirectional and bi-directional *services*. Indeed, by its own terms, the standard incorporated by reference in Section 76.640(b)(1)(i) applies to *all services* – there is no exception for bi-directional services.<sup>67</sup> Therefore, Cox is required to describe programming on an SDV platform in the out-of-band forward data channel and populate the virtual channel table with all of its programming services. As Cox did not provide a complete virtual channel table, Cox violated Section 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Commission's Rules.

27. Pointing to the inability of UDCPs to view two-way services, Cox claims that populating the virtual channel table for two-way services would confuse consumers with UDCPs.<sup>68</sup> We disagree. It is the *absence* of SDV programming from the virtual channel table that is confusing because it creates the false impression that the subscriber is receiving all of the programming to which he or she is entitled. Including the SDV programming in the virtual channel table would make it clear to Cox subscribers using CableCARD-equipped UDCPs that their cable operator is charging them for programming that they cannot see.

28. In any event, Commission regulatees may not pick and choose with which of the Commission's Rules they wish to comply. If Cox believed it had a legitimate reason to exclude two-way programming from the virtual channel table provided to customers with CableCARD-equipped UDCPs, the company should have sought a waiver of the relevant rules.<sup>69</sup> Accordingly, based on the record before us, we find that Cox apparently willfully violated Section 76.640(b) by failing to provide a virtual channel table as required by Section 76.640(1)(b)(i) and 76.640(b)(1)(v) in its Fairfax, Virginia cable system.

**C. Forfeiture Calculation**

29. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>70</sup> To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>71</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>72</sup> We conclude that Cox is

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<sup>65</sup> Second Supplemental LOI Response at 3.

<sup>66</sup> See 47 C.F.R. § 76.640 (“Support for unidirectional digital cable products on digital cable systems.”).

<sup>67</sup> *Id.* at § 76.640(b)(1)(i) (incorporating by reference SCTE 40 2003, Section 5.5, which states that “[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in an out-of-band Forward Data Channel...”).

<sup>68</sup> Second Supplemental LOI Response at 3.

<sup>69</sup> 47 C.F.R. § 76.1207.

<sup>70</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

<sup>71</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>72</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

apparently liable for a forfeiture in the amount of \$20,000 for its willful violation of Sections 76.1201, 76.640(b)(1)(i), and 76.640(b)(1)(v) of the Rules.

30. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,<sup>73</sup> we may assess a cable television operator a forfeiture of up to \$32,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$325,000 for any single continuing violation. In exercising such authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>74</sup>

31. The Commission's *Forfeiture Policy Statement*<sup>75</sup> and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1201.<sup>76</sup> In a similar case, the Commission proposed forfeitures for each cable system involved in the violation.<sup>77</sup> Thus, we propose to establish a base forfeiture amount for each cable system in which linear programming has been moved to an SDV platform, thereby impairing customers' use of navigation devices such as UDCPs to view such programming. As noted above, this case involves one Cox cable system – Fairfax County, Virginia.

32. Cox argues that Section 629 of the Act cannot be interpreted as precluding cable operators from deploying a two-way video platform as long as some customers own devices that are, by definition, one-way.<sup>78</sup> If such were the case, Cox contends, a small percentage of consumers could effectively prevent the implementation of technical upgrades that would benefit the vast majority of consumers.<sup>79</sup> Cox contends that the number of subscribers that rely on CableCARD-equipped UDCPs in its Fairfax County cable system is small (*i.e.*, less than 0.4% of its customers had purchased one-way

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<sup>73</sup> 47 U.S.C. § 503(b)(2)(A); 47 C.F.R. § 1.80(b)(1). The Commission has repeatedly amended Section 1.80(b)(1) of the Rules to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. Most recently, the Commission raised the maximum forfeitures applicable to cable operators, broadcast licensees, and applicants for such authority from \$32,500 to \$37,500 for a single violation, and from \$325,000 to \$375,000 for continuing violation. *See* Inflation Adjustment of Maximum Forfeiture Penalties, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits took effect September 2, 2008, apply to violations occurring after that date, and, accordingly, do not apply to this case.

<sup>74</sup> 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures. We consider Cox's apparent violation of Section 76.1201 of the Commission's Rules to have begun on the date its cable system moved previously available linear programming to an SDV platform. Cox's apparent violation continues each day that such programming remains unavailable to customers using CableCARD-equipped UDCPs.

<sup>75</sup> *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>76</sup> The Bureau has substantial discretion in proposing forfeitures. *See, e.g., InPhonic, Inc.*, Order of Forfeiture and Further Notice of Apparent Liability, 22 FCC Rcd 8689, 8699 (2007); *Globcom, Inc. d/b/a Globcom Global Commun.*, Order of Forfeiture, 21 FCC Rcd 4710, 4723-24 (2006). We may apply the base forfeiture amounts described in the *Forfeiture Policy Statement* and the Commission's rules, or we may depart from them altogether as the circumstances demand. *See* 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff *may* use these guidelines in particular cases [, and] *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

<sup>77</sup> *See, e.g., Cablevision Systems Corporation*, Forfeiture Order, 15 FCC Rcd 24298 (2000) ("*Cablevision Forfeiture Order*") (imposing forfeitures against Cablevision on a cable system basis).

<sup>78</sup> LOI Response at 4.

<sup>79</sup> *Id.*

devices),<sup>80</sup> and that on balance, the implementation of SDV provides an overall benefit to the entire customer base.<sup>81</sup>

33. While the number of subscribers that were prevented from using their CableCARD-equipped UDCPs to access certain programming may be a relatively small percentage of all cable subscribers, we consider the consumer harm resulting from actions here, which frustrate the Commission's broader goal of achieving a competitive navigation device market, to be significant.<sup>82</sup> Moreover, it is impossible to determine the injury actions like those at issue here may have inflicted on the market for one-way devices such as UDCPs. The movement of linear programming to an SDV platform, without having in place standards to ensure bi-directional compatibility of cable television systems and consumer electronics equipment without unnecessary licensing conditions, significantly harms the Commission's policies to move navigation devices toward a fully competitive market.<sup>83</sup> Consumers have little incentive to purchase a UDCP and lease a CableCARD when their cable provider already has moved more than a dozen channels to a platform inaccessible to such equipment.

34. One analogous violation for which the Commission has already established a base forfeiture is violation of the cable broadcast signal carriage rule, which has a base forfeiture of \$7,500.<sup>84</sup> Given the number of channels involved and the effect of actions like those here on the Commission's policy objectives, however, we find that a more significant penalty is appropriate. We conclude that \$10,000 per cable system in which linear programming is moved to an SDV platform is an appropriate base forfeiture for violation of Section 76.1201. In this case, Cox moved linear programming to an SDV platform in one cable system, Fairfax County, Virginia. Accordingly, we conclude that Cox is apparently liable for a \$10,000 forfeiture for its willful violation of Section 76.1201 of the Rules.

35. Additionally, we conclude that Cox is apparently liable for a forfeiture in the amount of \$5,000 for its willful violation of Section 76.640(b)(1)(i) of the Rules and \$5,000 for its willful violation of Section 76.640(b)(1)(v) of the Rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.640(b). We note, however, that Section 1.80(b) establishes a base forfeiture of \$5,000 for unauthorized discontinuance of service.<sup>85</sup> We find that the actions of Cox effectively discontinue a portion of the services for each of its CableCARD subscribers who choose to view content via a UDCP. We also conclude that the amount of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4-5. Cox states that its determination that the entire customer base would benefit from SDV led it to pursue the switched digital solution. Further, for the small number of customers using CableCARD-equipped UDCPs, Cox states it took steps to ensure these customers were not harmed by offering to transition this small group of customers at little or no incremental cost to bi-directional equipment.

<sup>82</sup> While the number of customers using CableCARD-equipped UDCPs may be a relatively small percentage of the overall number of MVPD customers nationwide, *see Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025, the absolute number is significant – more than 374,000 among the ten largest incumbent cable operator as of September 22, 2008. *See* Letter from Neal Goldberg, General Counsel, National Cable & Telecommunications Association, to Marlene Dortch, Secretary, FCC dated September 22, 2008 (filed in CS Docket No. 97-80) (compiling ten cable system reports on CableCARD usage).

<sup>83</sup> In addition, complaints received by the Commission and comments filed in CS Docket No. 97-80 suggest that consumers have been extremely frustrated by a multitude of cable operator-related problems with CableCARDS, including availability, pricing, and service quality issues. *See also* Letter from Julie M. Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association to Marlene Dortch, Secretary, Federal Communications Commission dated March 23, 2006 (filed in CS Docket 97-80) (listing difficulties of manufacturers in producing UDCPs due to alleged cable operator actions).

<sup>84</sup> 47 C.F.R. § 1.80(b)(4)(Note). *See also Cablevision Forfeiture Order*, 15 FCC Rcd at 24298 .

<sup>85</sup> 47 C.F.R. § 1.80(b)(4)(Note). Violation of the broadcast signal carriage rule is also analogous to Cox's failure to provide the SDV programming information in its virtual channel table. In contrast with violations of Section 76.1201, however, violations of Section 76.640(b)(1) do not affect the viewability of actual programming. Therefore, it is appropriate to impose a somewhat lesser penalty for such technical violations.

the proposed forfeiture for each violation is commensurate with the harm imposed upon cable subscribers. Because the violation of Section 76.640(b)(1) coincides with the migration of linear channels to an SDV platform, we will also apply this base forfeiture amount of \$5,000 for each technical violation of Section 76.640(b)(1) on a per cable system basis. Accordingly, we conclude that Cox is apparently liable for a forfeiture in the amount of \$10,000 for its willful violation of Sections 76.640(b)(1)(i) and 76.640(b)(1)(v) in its Fairfax County, Virginia cable system.

36. Cox's implementation of SDV in its Fairfax County, Virginia cable system, in which previously available linear programming was moved to an SDV platform, resulted in the removal of channel information and the loss of access to those switched channels for its subscribers using CableCARD-equipped UDCPs. Moreover, such implementation of SDV, without having in place standards to ensure bi-directional compatibility of cable television systems and CE equipment, effectively significantly harms the Commission's policies to move navigation devices toward a fully competitive market. We note that Cox could have sought a waiver of these rules under Section 76.1207, but failed to do so.<sup>86</sup> Accordingly, we conclude that Cox is apparently liable for a total forfeiture amount of twenty thousand (\$20,000) for its willful violation of Sections 76.1201 (\$10,000), 76.640(b)(1)(i) (\$5,000), and 76.640(b)(1)(v) (\$5,000) of the Commission's Rules.

#### **D. Cox Must Issue Refunds To Customers Harmed by Its SDV Implementation**

37. Cox's implementation of SDV has harmed its customers who opted to purchase and use television receiving equipment that does not require a cable operator-supplied set-top device to receive cable service. Many consumers purchased expensive UDCPs, such as "cable ready" televisions and digital video recorders like TiVos, based on the reasonable assumption that no set-top box would be necessary to receive linear programming.<sup>87</sup> In effect, Cox's movement of linear programming to an SDV platform has substantially diminished the value of its customers' UDCP devices. Moreover, CableCARD customers affected by Cox's SDV deployment now must pay higher prices to lease set-top boxes than they would have paid for CableCARDs. Those CableCARD customers who chose not to obtain the Cox-supplied set-top boxes after the implementation of SDV nevertheless have paid the same monthly rate for their cable service even though they can view significantly fewer channels. Most importantly, however, Cox's movement of linear programming to an SDV platform set back the shared goal of Congress and the Commission of a competitive market for commercially available navigation devices, as required by Section 629 and the Commission's rules.

38. In calculating the harm to Cox's customers who use UDCP equipment, we recognize that Cox has made offers to its CableCARD customers to offset the costs of obtaining a set-top box. Cox states that to mitigate the impact of its SDV deployment, it offered to transition subscribers with UDCPs to bi-directional equipment at no initial cost. Specifically, Cox's notice to its customers states:

If you're interested in a DVR receiver from Cox, for a limited time we're offering [a] DVR free for the first three months. A DVR will allow you to record your favorite shows and watch them on your schedule and also give you access to Cox On DEMAND and all the other great services offered with digital cable. Or, if you would prefer a standard digital receiver we are pleased to offer you one for the same price as a CableCARD for

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<sup>86</sup> Under Section 629(c) of the Act, 47 U.S.C. § 549(c) and Section 76.1207 of the Commission's Rules, 47 C.F.R. § 76.1207, the Commission may waive a rules adopted under Section subsection 629(a) of the Act for a limited time "upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. See 47 U.S.C. § 549(c), 47 C.F.R. § 76.1207.

<sup>87</sup> For instance, according to one complainant, the consumer "purchased a \$700 TiVo Series 3 and prepaid \$300 for three years of TiVo service. I did this with the understanding that Cox would provide CableCARDs that would give me access to all of their channels, with the exception of pay-per-view events. Their switch to Switched Digital Video leaves CableCARD customers like myself out in the cold, with no means of getting access to these channels." See Complaint No. 08-C00009190-1 at Attachment A.

the first year (\$1.99 a month).<sup>88</sup>

While Cox's offer to provide a free set-top box to its CableCARD customers may have provided temporary relief to some its customers; it was not a permanent solution -- the benefits promised by Cox expired months ago. Cox's offer did not address the critical problem concerning the company's interference with its customers' use of independently obtained UDCPs, *i.e.*, the of service to the extent customers can view fewer channels than they did before the movement of linear programming to an SDV platform, nor does it address the loss of functionality of the device in question.

39. Thus, we order Cox, within ninety (90) days of this *NAL and Order*, to issue refunds to CableCARD customers affected by the October 16, 2007 implementation of SDV in its Fairfax County, Virginia cable system. Specifically, Cox must provide refunds as follows:

- (a) For former CableCARD customers that began to lease any set-top boxes from Cox following notice of a possible SDV deployment, Cox must refund the difference in cost (if any) between the charges for the Cox set-top boxes and the CableCARDS previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDS even after notice of the SDV deployment, Cox must refund the customers' subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform and reduce their rates on a going-forward basis accordingly.

40. In addition, we require Cox to submit to the Enforcement Bureau an explanation of the method the company plans to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. Cox must submit this information to the Enforcement Bureau for review and approval within thirty (30) days of the release of this decision and must proceed with its proposed refund plan within sixty (60) days of such submission, provided the Enforcement Bureau approves Cox's proposed refund plan within thirty (30) days of Cox's submission.

#### IV. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commissions Rules, Cox Communications, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for willful violation of Sections 76.1201, 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Rules.

42. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Cox **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

43. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 601, and 629 of the Communications Act of 1934, as amended 47 U.S.C. §151, 154(i), 154(j), 521, 549, Cox must take the steps set forth in paragraphs 39 and 40 of this *NAL and Order*.

44. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to

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<sup>88</sup> LOI Response, Exhibit 3. By its own terms, this offer was both temporary and limited to existing residential CableCARD subscribers.

Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Cox will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

45. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Kevin Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

46. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

47. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail return receipt requested to counsel for Cox Communications, Inc., Gary Lutzker, Esquire, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington, DC 20036-6802.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief, Enforcement Bureau

## ATTACHMENT A

Representative Customer Complaints Received by FCC  
Concerning Cox Communications, Inc.'s Implementation of SDV  
in its Fairfax County, Virginia Cable System

Date Received	Complaint Number	Consumer Complaint
03/22/2008	08-C00009190-1	On October 16, 2007, Cox Communications in Fairfax Virginia began using Switched Digital Video to encode all new channels that they have added to their service. As a CableCARD customer, I am paying for channels that I cannot view. Starting next month the MLB Extra Innings package will begin for a new season and will be moved to Switched Digital Video, thus also being unavailable to me. When I signed up for Cox's High Definition service, I purchased a \$700 TiVo Series 3 and prepaid \$300 for three years of TiVo service. I did this with the understanding that Cox would provide CableCARDS that would give me access to all of their channels, with the exception of pay-per-view events. Their switch to Switched Digital Video leaves CableCARD customers like myself out in the cold, with no means of getting access to these channels. It was my understanding that the Integration Ban forbade this behavior.
02/16/2008	08-C00002771-1	I recently purchased a TiVo HD and had Cox install a Multi-stream CableCARD in it. Currently, there are over 15 channels that do not come in due to decisions made by Cox to not support CableCARDS and third party products such as my TiVo HD. When Cox recently added several new channels in my area (northern Virginia) they did so using SDV technology. This is like a two-way service which Cox doesn't support with CableCARDS. Cox doesn't say or admit anywhere that you can't get a bunch of channels because they use SDV, only PPV and VOD. By not being able to receive these channels with a TiVo and CableCARD, Cox is violating an FCC mandate for cable companies to support such devices. They render competing device useless and the more channels added in this manner, the more Cox is guaranteeing reliance on their own equipment.
12/07/2007	07-W13582835	Currently because of high definition SDV Cox is providing in my area, my TiVo HD unit will not receive various HD channels with the Cox CableCARDS I am paying for, they will only work if I lease a Cox HD receiver. This seems highly unfair to those who like the alternatives of having to lease only Cox HD hardware solutions.
10/31/2007	Letter	I am filing this complaint against Cox Communications on the grounds that the company is in violation of the Telecommunications Act of 1996. Specifically, Cox is limiting the number of digital channels I receive because I use a CableCARD. The spirit of this Act was to give consumers a choice when deciding which type of device to use to view cable channels. Now, Cox Communications is advising consumers that the only way one can get the full digital cable lineup is to use a Cox cable box. If one chose to use a CableCARD, one would still pay for the digital lineup but not receive 75 of those channels in digital format. To be clear, for over two years I have subscribed to digital cable, with a Cox CableCARD, and have analog. I contacted a Cox technician about the issue and was informed I would be required to use a cable box in order to regain the digital channels I had lost. I then contacted a manager in the Herndon, Virginia office, who informed me of the same. As a resolution, I would like to see Cox provide the full digital lineup to consumers who have made the choice to use CableCARDS. This request would exclude any channels that require two-way communications such as On Demand, Digital PPV, interactive, etc., that CableCARDS currently do not support. Second, if Cox is allowed to exclude digital channels to consumers, then the consumer should have a prorated billing statement that directly

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		<p>correlates as a percent of the digital video channels the consumer is losing. For example, if 100 digital video channels cost \$100 dollars and 75 of those channels are not obtainable in digital format for consumers who choose to use CableCARDS, then Cox should only charge \$25 dollars a month not \$100. I will caveat this resolution because it may give Cox the ability to discriminate [against] popular digital channels such as CNN and CSPAN for use with the Cox cable box-only approach and leave the Cox CableCARD user with the less popular channels. Lastly, the same percentage based billing logic, as stated above, should be retroactively applied and cost reimbursed, to all current Cox cable card subscribers who have had their service switched from digital to analog. This retroactive refund should be automatically applied.</p>
08/23/2007	07-W13311936	<p>On September 10, 2007 my cable company, Cox Communications, begins rolling out its switched digital service. Because I'm a CableCARD user, I will no longer be able to access 54 previously accessible channels. This will surely increase over time to include every channel. If I want to access these channels, Cox says I'll have to lease one of their digital receivers. Which, of course, is more expensive. And I don't have a choice. Competitor's set-top boxes and DVRs (TiVo's for example) are incompatible with switched digital. I thought the FCC required cable providers to support the CableCARD standard and to correct incompatibilities between their networks and certified CableCARD devices. By making their network less compatible with CableCARD, Cox is forcing me to give up my CableCARD for one of their set-top boxes. The FCC should not allow cable companies to hobble or render competitive set-top boxes unusable by deploying new switching technology that won't work with other boxes. I want the FCC to stop Cox from deploying its switched digital technology until such time as (1) they can provide me with a CableCARD that is compatible with switched digital, or (2) competitive set-top boxes and DVRs compatible with switched digital are brought to market by the Consumer Electronics industry. I demand a choice in the marketplace. In the event the FCC allows Cox to reduce my current cable service, I want my cable bill prorated. I shouldn't have to pay the same money for fewer channels.</p>